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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1598

JAMES D. HODGSON, Secretary of Labor, Petitioner

v.

ARNHEIM AND NEELY, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondents respectfully request this Honorable Court to grant a rehearing in the within case, in order to reconsider the result reached herein, for the following reasons:

This Honorable Court has granted certiorari in the case of *Falk v. Brennan,* sub nom *Falk v. Shultz,* . . . . U. S. . . . . , No. 72-844, in order to determine issues which this Court deemed not before it in the instant case. A determination of those issues in favor of Falk would create an anomolous situation, wherein respondents here would be faced with having to comply with a decision which would be contrary to a later decision rendered by this Court. The unfairness of this situation is readily apparent.

With respect to the two issues allegedly not before this Court, the respondents take the following positions:

1. While the lower court held that gross rentals were the measure to be used in determining coverage under the Act, nevertheless the lower court held that each building should be examined separately. In effect, the court held that gross rentals of *each separate building* was the controlling factor, and *not* the gross rentals collected by the agent. Obviously, respondents had no quarrel with this result, and no cross-petition for certiorari was deemed necessary.

2. Similarly, the lower court's holding that the agent was an "employer" must be read in the context of the overall decision requiring a separate examination of each building. The Third Circuit's statement (P. 21, Pet. for Certiorari) that the agent's "vicarious liability" as an employer nevertheless did not require pooling of gross rentals indicated that the court recognized the distinction between an employer for the purpose of *coverage*

under the Act and an employer for the purposes of *enforcement* of the Act. The Third Circuit was merely holding the agent an "employer" under the latter category. Once again, respondents had no quarrel with this interpretation. Likewise, Mr. Justice White, at page 4 of his dissent, recognizes this distinction.

Respondents submit that both issues, taken in the light of the overall decision, were *not* decided adversely to their position, and consequently, no cross-petition for certiorari was indicated. Moreover, this Honorable court has the power to consider any arguments which support respondents' position. Ample authority for this proposition is set forth in respondents' brief at pages 20 and 21, summarized as follows:

The authorities are clear that although an appellee may not attack the decree in order to enlarge his own rights, or lessen the rights of his adversary, nevertheless the appellee may, without taking a cross appeal, urge in support of the decree any matter appearing in the record.

U. S. v. American Ry Express Co., 265 U. S. 425 (1924)

Moreover, no decision has denied the *power* of the court to review objections urged by respondent, although he has not applied for *certiorari*, if the court decrees there is good reason to do so.

Langnes v. Green, 282 U. S. 531 (1931).

Applying the above rulings to the instant case, respondents do not seek to enlarge their rights, but merely to affirm the lower courts holding that:

1. Gross receipts are determined by the total at each separate building, and

2. The agent is the employer only for purposes of enforcement of the Act.

Both holdings were made by the lower court and in so holding, respondents were not harmed.

In the final analysis, the power of this Honorable Court is available in determining these issues in order to create uniformity in the courts. For these reasons, we respectfully request that a rehearing based on these issues be granted, so that both the instant case and *Falk* will be decided on a consistent basis.

The Secretary's position in the Falk case, as evidenced by its Memorandum in opposition to the Falk petition for certiorari, was that he would not oppose a redetermination of the enterprise issue in light of the Arnheim decision (p. 3 of Memorandum). By parallel reasoning, the *Arnheim* case should now be redetermined in the light of *Falk*. We would hope that a rehearing would accomplish this result, and thus avert a great injustice to Arnheim if it is required to comply with a ruling that would affect no other real estate agent in the country.

Respectfully submitted,

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Affidavit.

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Eugene B. Strassburger, Jr., Esq., being duly sworn according to law, deposes and says that he is counsel for the within named petitioner, and that the foregoing Petition for Rehearing is not being made for the purpose of delay, but is presented in good faith.

EUGENE B. STRASSBURGER, JR.

Sworn to and subscribed before me this 13th day of March, 1973.

HELEN U. RAAB
Notary Public
Pittsburgh, Allegheny County, Pa.

[SEAL]

My Commission Expires February 4, 1977.